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No. 749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

UNITED AIRCRAFT CORPORATION, *Petitioner*

v.

LODGE 743, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

and

LODGE 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

and

NATIONAL LABOR RELATIONS BOARD, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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NATIONAL LABOR RELATIONS BOARD, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United Aircraft Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on October 1, 1964.

OPINIONS BELOW

The decision and order of the United States District Court for the District of Connecticut is reported at 220 F. Supp. 19, and is printed in Appellant's Appendix filed herewith (A. 3).[1] The opinion of the Court of Appeals is reported at 337 F.2d 5, and is printed in Appendix A hereto, *infra*, pp. 1a-12a.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1964 (*infra*, p. 12a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

As part of a strike settlement, petitioner and the unions which represented the striking employees mutually agreed in writing to arbitrate whether certain strikers charged by petitioner with strike misconduct should have the same reinstatement rights as the other employees. The agreement specified that the arbitration would "finally and completely" dispose of the matter without "review under any State or federal laws". After adverse arbitration awards, the unions filed charges with the General Counsel of the National Labor Relations Board claiming, *inter alia*, that petitioner's refusal to accord these employees full reinstatement was an unfair labor practice and the General Counsel issued a complaint on the charges. In suits by the unions under Section 301 of the Labor Management Relations Act, 1947 (29 U.S.C. § 185; *infra*, p. 15a), petitioner counterclaimed that the filing of

[1] Numbers following the abbreviation "A." refer to pages of Appellant's Appendix in the Court of Appeals below, nine copies of which have been filed with this Court.

charges with the Genral Counsel regarding the strikers whose cases had been arbitrated was a breach of the finality provisions of the arbitration agreement and prayed, *inter alia*, for injunctive relief requiring the unions to withdraw the charges respecting these strikers. Citing Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a); *infra*, p. 14a), which provides, *inter alia*, that the authority of the National Labor Relations Board "to prevent . . . any unfair labor practice" "shall not be affected by any other means of adjustment . . . established by agreement, law, or otherwise", the District Court dismissed the counterclaims. On appeal, the Court of Appeals affirmed. The question presented, therefore, is—

Whether the foregoing provision of Section 10(a) of the National Labor Relations Act, enacted in 1935, frustrates effectuation of the later Congressional policy embodied in Section 301 of the Labor Management Relations Act, enacted in 1947, of fostering private settlement of labor disputes by enforceable and binding arbitration, in that private parties, after final and binding arbitration, may not be restrained from filing unfair labor practice charges with the General Counsel of the Board for the purpose of relitigating before the Board the issues settled in the arbitration proceeding?

STATUTES INVOLVED

The statutory provisions involved are Sections 3(d), 8(a)(1) and (3), and 10(a) and (b) of the National Labor Relations Act (29 U.S.C. § 153(d), 158(a)(1), (3), 160(a), (b); herein called the Act) and Section 301 of the Labor Management Relations Act, 1947 (29 U.S.C. § 185). They are printed in Appendix B hereto, *infra*, pp. 13a-17a.

STATEMENT OF THE CASE

1. The Facts

This petition requests the Court to review a decision and judgment of the Court of Appeals for the Second Circuit sustaining, on appeal under 28 U.S.C. § 1292 (1),[2] an order of the District Court of Connecticut dismissing, on motion prior to trial, the counterclaims filed by petitioner (hereinafter called the Company) in suits instituted by respondent unions (hereinafter called the Union) pursuant to Section 301 of the Labor Management Relations Act, 1947. The Union's suits claimed breach of the reinstatement provisions of a strike settlement agreement, part of which was agreement to arbitrate whether certain strikers should be granted reemployment rights. The Company's counterclaims alleged breach of the arbitration agreement and prayed, *inter alia,* for injunctive relief.

a. Background

The pleadings in the District Court disclosed the following background to the suits and counterclaims:

On August 5, 1960, the Company and the Union reached agreement on terms for settling a strike involving approximately 21,500 of the Company's employees which had been in progress since June 9, 1960 (A. 11-13, 65-66). The agreement reached was (1) on terms for a new collective bargaining contract, (2) on terms for returning the strikers to work, and (3) on arbitration of whether 50 employees the Company charged with misconduct during the strike should be accorded the same recall rights as the other employees

[2] This section, insofar as pertinent, authorizes appeals from interlocutory orders of the district courts denying injunctive relief.

(*ibid.*). After approval of the strike settlement agreement by the membership, the Company and the Union, on August 11, 1960, executed agreements setting forth the terms for returning strikers to work (A. 24, 77) and, on August 24, 1960, signed an arbitration "submission" agreement detailing the conditions for arbitration of the cases of the 50 employees (A. 42, 90).[3]

The "submission" agreement specified that the purpose of the arbitration was "To resolve . . . finally and completely, and without recourse whatsoever to any appeal or review under any State or federal laws by the Unions, or by the Company, or by any individual employee whose name is listed on Exhibit C attached hereto" whether the 50 employees listed had "engaged in conduct which warrants said employees being accorded reinstatement rights any different from, or less than, those accorded any other employees" (A. 43, 91-92). The agreement provided for submission of the matter to a panel of three retired judges of the Supreme Court of Connecticut sitting "as an impartial board of arbitration" which "shall have full, complete and final jurisdiction and authority" (A. 44, 92).

By the time of the arbitration hearing 14 names had been dropped from the list of 50, and during the hearing the Union withdrew its defenses as to 6 others (A. 87). As for the remaining 30 strikers, the arbitrating Justices, after hearing, found them guilty of strike misconduct and denied them recall rights under the strike settlement agreement in varying degree (A. 38-39, 86-87).

Notwithstanding the agreement that the arbitration would "finally and completely" dispose of the reem-

[3] The new collective bargaining agreement also was signed.

ployment rights of these strikers, "without recourse whatsoever" to any other procedures, the Union thereafter in December 1960 and subsequently filed charges with the General Counsel of the National Labor Relations Board (herein called the General Counsel) under Sections 8(a)(1) and (3) of the Act claiming, *inter alia*, an unfair labor practice in the Company's refusal to accord full reinstatement rights to the 30 strikers denied full recall rights by the arbitrators for strike misconduct and the six who the Union conceded were not entitled to recall because of such. In February 1963, the General Counsel issued a complaint predicated on the Union's charges, including the claims as to the 36 strikers involved in the arbitration, and in May 1963, hearing on the complaint began before a trial examiner (A. 39-40, 87-89). This hearing is still in progress.

b. The Section 301 Suits

Meanwhile, in December 1961, the Union filed suits under Section 301 of the Labor Management Relations Act, 1947 (*infra*, p. 16a), in the District Court of Connecticut alleging that the Company had violated that portion of the strike settlement agreement relating to the recall of strikers (A. 11-23, 65-77). These suits are still pending, the Union not yet having filed more definite statements of claims as directed by the court (A. 2).

c. The Counterclaims

In May 1963, the Company filed in the Section 301 suits the counterclaims here involved (A. 37-42, 85-90). The counterclaims alleged that the Union had breached the arbitration part of the strike settlement agreement

(1) by charging with the General Counsel that the Company had engaged in an unfair labor practice by not granting full reinstatement to the 36 strikers involved in the arbitration, (2) by thereafter urging the General Counsel to issue a complaint in respect to the 36 strikers, and (3) by appearing through counsel at the hearing on the complaint and actively participating therein in an effort, *inter alia*, to overturn the results of the arbitration (A. 39-41, 87-89).

The Company relied on the provisions in the arbitration submission agreement specifying that the arbitration results would be final and "without recourse whatsoever to any appeal or review under any State or federal laws" (A. 38, 85-86). The counterclaims prayed for declaratory judgment; for an injunctive decree requiring the Union to "withdraw" its charges regarding the 36 strikers, to "request and move" the General Counsel to dismiss his complaint in respect to them, and to refrain "in any manner" from attacking the results of the arbitration; and for damages.

The Union and the National Labor Relations Board (herein called the Board), which later was permitted to intervene, moved to dismiss the counterclaims on the ground, *inter alia*, that they failed to state a claim upon which relief could be granted (A. 62, 115).

d. The District Court's Decision

After argument and briefs, the District Court, on August 1, 1963, dismissed the counterclaims, holding (A. 7):

> Insofar as the arbitration agreement of August 24, 1960 attempted to preclude by contract the Union or its members from filing unfair labor

practice charges against the company with the National Labor Relations Board, it is contrary to Federal law and is unenforceable.

2. The Court of Appeals' Decision

The Company appealed the dismissal of the counterclaims under 28 U.S.C. § 1292(1). The Court of Appeals, on the posture of the case, rejected the Union's claim that the arbitration agreement did not effectively bar the filing of unfair labor practice charges in respect to the Company's refusal to grant the 36 strikers full reinstatement rights (*infra*, p. 5a), but nonetheless held that the agreement was unenforceable.

Citing Section 10(a) of the Act,[4] and distinguishing cases relied upon by the Company (*infra*, pp. 6a-8a), the court predicated its decision on a list of cases it characterized as establishing "that the right to resort to the Board for relief against unfair labor practices cannot be foreclosed by private contract" (*infra*, p. 6a). The court also rejected the Company's argument that these cases should be reexamined in the light of the changed federal labor laws and recent decisions holding that rights under the Act can be waived by private agreement and decisions fostering and expanding binding arbitration as part of the federal labor policy (*infra*, p. 7a).

Finally, the court rejected the alternate argument of the Company that waivers in arbitration agreements

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[4] Section 10(a) states in relevant part—

"The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise: . . ." (*infra*, p. 14a).

of the right to file charges with the Board should at least be enforced in cases where it is the declared policy of the Board to defer to arbitration awards, and thus not leave the General Counsel free at his whim to issue a complaint and force relitigation before the Board of an arbitrated matter when, as in this case, no departure from Board policy is even suggested (*infra*, pp. 10a-11a). Two members of the court did suggest that in effectuating its policy in this regard the Board should take "into consideration" that the "arbitration award in this case, having been rendered by three former Chief Justices of the Supreme Court of Errors of the State of Connecticut, carries unusual weight" (*infra*, p. 11a).

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals below is a direct holding on an issue of major importance to the development of the federal labor law policy, namely, whether Section 10(a) of the Act forecloses private parties from entering into *enforceable* arbitration agreements which preclude resort to the unfair labor practice procedures of the Act following an adverse decision in an arbitration proceeding the fairness of which is in no respect challenged.

The decision of the court of appeals below that Section 10(a) does bar such enforceable agreements, is the first court holding squarely on the point. It conflicts in principle with holdings in other cases by this Court and other courts of appeals. It challenges the decisions of this Court, such as *Smith* v. *Evening News Ass'n*, 371 U.S. 195, holding that the "preemption doctrine" based upon "the exclusive jurisdiction" of the Board is inapplicable to a suit under Section 301. Plainly,

this is a question which in the public interest should be settled by this Court.

This is one of those "serious problems" regarding conflicts between the authority of the Board and the courts under Section 301 which this Court stated in *Smith* it "shall face . . . when they arise" (*ibid.*, at p. 198). The decision below clearly undermines the many decisions of this Court holding that the federal labor policy is to foster the "means chosen by the parties for settlement of their differences under a collective bargaining agreement". *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 566. See also, *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 455-456; *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 214; *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionery Workers*, 370 U.S. 254, 263; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596; *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.*, 369 U.S. 95, 105.

As this Court explained in *Enterprise Wheel*, *supra*, at p. 599, "plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final". This is so whether the review is in a court or a Board proceeding.

The Section 10(a) preemption provision had its genesis in the 1935 Congressional desire to avoid the confusion which resulted under the earlier National Industrial Recovery Act (48 Stat. 195) with multiple boards (see S. Rep. No. 573, 74th Cong., 1st Sess., pp.

4-5, 15). But even then the Congress did not empower the Board, *sua sponte,* to prevent unfair labor practices; it empowered the Board to do so only upon filing of a charge (Sec. 10(b) of the Act; *infra,* p. 15a). Thus, it left to the choice of the private party whether or not to seek redress of an unfair labor practice by the filing of a charge. All Congress did was to restrict redress, if desired, to the Board (Sec. 10(a) of the Act; *infra,* p. 14a).

It does seem illogical that if Congress left to the citizen the decision of whether or not to file an unfair labor practice charge, it did not also leave to him the decision of whether or not to agree in exchange for binding arbitration *not* to file a charge. With this freedom of decision, it demeans our jurisprudence to hold that such a voluntary agreement may not be enforced.

Such further seems anomalous in view of the fact that Congress in the 1947 amendments to the Act interjected an intermediary between the citizen who has decided to file a charge and the Board who has the exclusive authority "to prevent" unfair labor practices—the General Counsel (Sec. 3(d) of the Act; *infra,* p. 13a). Under the amendment, the General Counsel has the "final authority" to decide whether to bring the charge before the Board on complaint (*ibid.*). Thus, although the Board has the exclusive authority "to prevent" unfair labor practices, there are two persons now empowered to prevent them from reaching the Board—the citizen and the General Counsel.

At the same time, and later in the 1959 amendments, Congress even limited the exclusiveness of the Board's authority in respect to matters brought to it on charges

by the citizenry and complaints issued by the General Counsel by empowering other bodies to act on them (see Sec. 10(a), 10(j), 10(l), 14(c) of the Act, and Sec. 301, 303 of the Labor Management Relations Act, 1947, as amended (29 U.S.C. § 160(a), (j), (l), 164(c), 185, 187)).

As to the enforceability of a contractual waiver of the exclusive authority of the Board, this Court in *Retail Clerks International Ass'n* v. *Lion Dry Goods, Inc.*, 369 U.S. 17, remanded for enforcement a strike settlement agreement requiring the withdrawal of "petitions, unfair labor practice charges and litigation before the National Labor Relations Board" (at p. 20, fn. 4) with the holding that "If this kind of strike settlement were not enforceable under § 301(a), responsible and stable labor relations would suffer" (at p. 27). The suggestion of the court of appeals below (*infra*, p. 8a) that this Court did not take cognizance of the "kind of strike settlement" it remanded for enforcement in that case loses substance in view of its reproduction at length in this Court's opinion (at p. 20, fn. 4).

Moreover, in its *Lion Dry Goods* decision this Court cited with approval the Seventh Circuit's decision in *United Textile Workers* v. *Textile Workers Union*, 258 F.2d 743, which required the defendant to withdraw a "representation petition" filed with the Board and "to conform in all respects to the arbitration award" under a "No-Raiding" agreement (at pp. 744-745).[5] The distinction drawn by the court below be-

[5] In *N.L.R.B.* v. *Weyerhauser Co.*, 276 F. 2d 865, the Seventh Circuit reaffirmed its intention not to "give blanket approval of the Board's policy of refusing to recognize no-raiding agreements" (p. 875).

tween unfair labor practice cases and representation proceedings (*infra*, pp. 8a-9a) is irrelevant, if it exists. The question is whether a court, pursuant to a firm contractual agreement for binding arbitration, may under Section 301 direct a private party to adhere to such agreement by withdrawing proceedings before the Board.

The relief requested here in the District Court was directed solely at the Union, the other party to the arbitration agreement, and merely for the purpose of enforcing adherence to its solemn promise. There is nothing in the relief sought which would depreciate the authority of the Board to adjudicate charges properly before it notwithstanding any private agreement. In the instant matter, the relief requested would have left the General Counsel entirely free to submit the question to the Board for determination by the simple device of refusing to approve the withdrawal of the allegations in the charges and of refusing to delete from his complaint reference to the 36 strikers.

The view that parties under Section 301 may be required to abandon proceedings before the Board is not strange. As noted, even under the original Act parties could agree to refrain from filing charges to redress unfair labor practices in exchange for other advantages. As long as they adhered to the agreement, the Board was powerless to act. However, if they breached the agreement and filed a charge the Board was free to entertain it because there was no countervailing federal policy to compel adherence to contractual promises of this nature. However, with the enactment of Section 301, implementing the federal labor policy of fostering private settlement of disputes with ma-

chinery for enforcing such settlements, it seems clear that accommodation between the two Congressional policies requires readjustment in favor of the current fostering of private settlements. See Summers, *Labor Law Decisions of the Supreme Court 1962 Term,* Labor Relations Law Section 1963 report to the American Bar Association, p. 8; Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems,* 57 Col. L. Rev. 52, 67.

Professor Cox, now Solicitor General, recently wrote —"a suit to compel arbitration under Section 301 is an action to enforce a promise. The promise is the undertaking to arbitrate and *carry out the award.*" Cox, *Reflections Upon Labor Arbitration,* 72 Harv. L. Rev. 1482, 1507 (emphasis added). See also *Timken Roller Bearing Co.* v. *N.L.R.B.,* 325 F.2d 746, 754 (C.A. 6). If enforcement of binding arbitration is part of the federal law, it is difficult to perceive how it could be contrary to it as the courts below held (*infra,* pp. 4a-5a). Nor is there any just reason for the result here of the finality of the arbitration being enforceable against the Company but not the Union.

The enforceabilty of contractual waiver of rights under the Act by private parties has been recognized by the courts not only in respect to Section 9 rights in the "No Raiding" agreement situations, but also in respect to Section 10 rights under Section 8(a)(5) of the Act regarding the right to wage and other data. In *Timken Roller Bearing Co.* v. *N.L.R.B.,* 325 F.2d 746 at p. 751, cert. denied 376 U.S. 971, the Sixth Circuit expressly characterized the right to this data "as a statutory right" which the "Union could have relinquished . . . under the provisions of the bargaining agreement if it, as a part of the bargaining process,

elected to do so". To the same effect see *N.L.R.B.* v. *Perkins Machine Co.*, 326 F.2d 488 (C.A. 1). The distinction the court of appeals below suggests (*infra*, p. 9a) "may" exist between the waiver of Section 10 rights arising under Section 8(a)(5) and those arising under 8(a)(3), which latter section is here involved (*infra*, p. 13a), is without substance. The argument that enforceable waivers are prohibited is hinged to the statutory language of Section 10(a) empowering the Board "to prevent" "*any* unfair labor practice" (emphasis added). This prohibition, if it exists, in no respect turns on the statutory specificity of the "unfair labor practice". Moreover, Section 8(a)(3) as well as Section 8(a)(5) contains only a "generalized prohibition" and also requires effectuation by "extrapolation".

Finally, assuming as the court of appeals below stated (*infra*, p. 7a), that the "public interest in preventing unfair labor practices cannot be entirely foreclosed by a purely private arrangement, no matter how attractive the arrangement may appear to be to the individual participants," it does seem that the fostering of private settlement of disputes by binding arbitration requires at least some curb in the courts against the reckless relitigation before the Board of arbitrated matters at the whim of the losing party and the General Counsel. The court of appeals acknowledged that it is the Board's declared policy to defer to arbitration awards (*infra*, p. 11a):

> "... 'unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act.'"

This policy was reaffirmed before this Court in the Board's *amicus curiae* brief in *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (see *ibid.*, p. 198, fn. 6). At least before the arbitration award is allowed to be attacked the charging party should be required to charge a breach of the Board's policy and the General Counsel should be required to allege and prove such breach. This is not a matter which should be left to the unfettered determination of the private party and the General Counsel but should be part of the "body of federal law" fashioned from the "policy of our national labor laws". *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 451, 456.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1964

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 384—September Term, 1963.

(Argued May 26, 1964 Decided October 1, 1964.)

Docket No. 28595

LODGE 743, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Plaintiff-Appellee,

NATIONAL LABOR RELATIONS BOARD,

Intervenor,

v.

UNITED AIRCRAFT CORPORATION,

Defendant-Appellant.

LODGE 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Plaintiff-Appellee,

NATIONAL LABOR RELATIONS BOARD,

Intervenor,

v.

UNITED AIRCRAFT CORPORATION,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and HAYS, *Circuit Judges.*

Appellant corporation appeals pursuant to 28 U. S. C. § 1292(a)(1) from a denial of injunctive relief and seeks reversal of judgment order, United States District Court for the District of Connecticut, Clarie, *J.* (opinion reported at 220 F. Supp. 19), by which appellant's counterclaim pleaded in suit brought by appellee Unions was dismissed

for failure to state a claim upon which relief could be granted. Affirmed.

* * * * * * * *

WATERMAN, *Circuit Judge:*

Appellees (hereinafter the Union) brought suit in the United States District Court for the District of Connecticut under § 301(a) of the Labor Management Relations Act, 29 U. S. C. § 185(a), alleging that appellants (hereinafter the Company) had violated a strike settlement agreement dated August 11, 1960. The Company counterclaimed, also under § 301(a), alleging a violation by the Union of a subsequent arbitration submission agreement dated August 24, 1960, and requesting declaratory relief, injunctive decrees, and damages. The Union, joined by the National Labor Relations Board as an intervenor, moved to dismiss the counterclaim on several grounds, including failure to state a claim upon which relief could be given, and on August 1, 1963 the motion was granted. The opinion below is reported at 220 F. Supp. 19. The Company appeals to this court under 28 U. S. C. § 1292(a)(1), which, insofar as it is relevant, authorizes appeals from interlocutory orders denying injunctive relief.[1]

The claims and counterclaims in this suit arose out of a strike called by the Union at four Company plants in June, 1960. The strike ended in failure two months later with the conclusion of a settlement agreement which provided, in part, for the recall to work of the strikers according to a complex formula. The Company, however, refused to apply the agreement to fifty employees whom it accused of misconduct during the strike. The Union, in response, contended that these employees had not engaged in conduct

[1] This appeal therefore concerns only the denial of injunctive relief, and not the dismissal of the Company's request for a declaratory judgment and damages.

which merited them less favorable treatment than the other strikers received. Unable to reach an understanding, the parties executed an arbitration submission agreement which provided in part:

"To resolve this issue . . . finally and completely, and without recourse whatsoever to any appeal or review under any State or federal laws by the Unions, or by the Company, or by any individual employee whose name is listed on Exhibit C attached hereto, the Unions (acting for and on behalf of themselves and in their capacity as representatives of the said individual employees so listed) and the Company agree as follows:

"1. The Honorable Raymond E. Baldwin, Chief Justice of the Supreme Court of Errors for the State of Connecticut, may appoint, and is hereby requested to appoint, a panel of three retired judges of the said Court (including a fourth judge to act as an alternate in this matter) to sit as an impartial board of arbitration to hear and decide finally and completely the aforesaid issue concerning the reinstatement rights of each of the striking employees whose names are listed on Exhibit C.

* * * * *

"4. The panel shall have no jurisdiction or authority to award back pay to any employee involved in this matter, or to assess against any of the parties any monetary award or penalty, but shall have full, complete and final jurisdiction and authority to determine and decide whether any individual whose name is listed on Exhibit C attached hereto should, under all of the circumstances, be accorded all, or any part, or none of the rights and privileges accorded other striking employees under the strike settlement agreements . . ."

By the time of the arbitration hearing fourteen names had been dropped from the list, and during the hearing the

Union withdrew its claims in behalf of six others. As for the remaining thirty employees, the arbitrators found them guilty of strike misconduct and deprived them of some or all of their rights under the strike settlement agreement.

Undaunted, beginning in December 1960, the Union filed unfair labor practice charges with the National Labor Relations Board under §8(a)(3) and §8(a)(1) of the National Labor Relations Act, 29 U. S. C. §§158(a)(3), 158(a)(1), alleging that the Company was discriminating against approximately 3500 employees, including the thirty-six whose names remained on the list at the start of the arbitration hearing, by denying them reinstatement rights because of their participation in the strike. In February, 1963, the General Counsel of the Board issued a complaint based on the Union's charges, and in May, 1963, a hearing began before a trial examiner.

Meanwhile, the Union had also brought suit under §301(a) in December, 1961, claiming a violation by the Company of the strike settlement agreement. In response, the Company, in May, 1963, filed the counterclaim at issue in this appeal, alleging that the Union had violated the arbitration submission agreement by charging the Company with an unfair labor practice as to the thirty-six employees. The Company relied on the provision of the arbitration agreement which sanctioned a final determination of the rights of the thirty-six employees, "without recourse whatsoever to any appeal or review under any State or federal laws." As injunctive relief, the Company requested a decree requiring the Union to withdraw its unfair labor practice charges regarding the thirty-six employees, and another decree forbidding the Union from attacking the arbitration award in any other way.

In dismissing the counterclaim for failure to state a claim upon which relief could be granted, the court below held:

> "Insofar as the arbitration agreement of August 24, 1960, attempted to preclude by contract the Union

or its members from filing unfair labor practice charges against the company with the National Labor Relations Board, it is contrary to Federal law and is unenforceable." 220 F. Supp. 19, 23.[2]

For the reasons now to be stated, we agree.

At the outset we are faced with a question concerning interpretation of the arbitration agreement. The Union argues that it was not the intent of the parties to bar the filing of unfair labor practice charges before the Board, or at least the filing of charges such as are involved in this case. Alternatively, even if the provision of the agreement can be construed as a waiver of the right to file unfair labor practice charges, the Union contends it was not sufficiently clear and unmistakable to be given legal effect. These arguments, however, raise in part questions of fact as to the circumstances of the agreement that cannot be dealt with on a motion to dismiss.[3] For the purposes of this appeal we must accept the allegation of the Company that the arbitration agreement effectively barred the filing of unfair labor practice charges in connection with the refusal of the Company to grant the thirty-six employees full reinstatement rights.

Turning now to the nub of the case, we must decide whether §301(a) authorized the lower court to grant enforcement of the arbitration agreement as interpreted above. In performing this task, the Supreme Court has instructed us to consult "the policy of our national labor laws," including "express statutory mandates." *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 456-457

[2] The lower court's decision thus related only to inhibitions on the filing and pusuit of unfair labor practice charges, and not to other kinds of legal recourse by the Union.

[3] According to the record on appeal, there was no trial of the Company's counterclaim, but only oral argument and the filing of briefs.

(1957). We conclude that the policy and the express mandates of the National Labor Relations Act are opposed to the enforcement of that part of the arbitration agreement which bars the Union from maintaining unfair labor practice charges before the Board.

The standard rule in cases such as this, enunciated in numerous decisions of the Supreme Court, this court, and the courts of other circuits, is that the rigth to resort to the Board for relief against unfair labor practices cannot be foreclosed by private contract. For example, see *J. I. Case Co.* v. *NLRB*, 321 U. S. 332, 336-39 (1944); *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 359-61 (1940); *NLRB* v. *Radio Officers' Union*, 196 F. 2d 960, 965 (2 Cir. 1952), *aff'd*, 347 U. S. 17 (1954); *NLRB* v. *E. A. Laboratories, Inc.*, 188 F. 2d 885, 887 (2 Cir. 1951), *cert. denied*, 342 U. S. 871 (1951); *International Union of Elec. Workers* v. *NLRB*, 328 F. 2d 723, 727 (3 Cir. 1964); *NLRB* v. *Threads, Inc.*, 308 F. 2d 1, 8 (4 Cir. 1962). Nor is an arbitration award of any greater effect in this respect. *NLRB* v. *Bell Aircraft Corp.*, 206 F. 2d 235, 237 (2 Cir. 1953); *NLRB* v. *Hershey Chocolate Corp.*, 297 F. 2d 286, 293 (3 Cir. 1961); *NLRB* v. *International Union, UAW*, 194 F. 2d 698, 702 (7 Cir. 1952).

These decisions are based on the express language of §10(a) of the National Labor Relations Act, 29 U. S. C. §160(a), which provides in part:

> "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: . . ."

This express statutory mandate, in turn, reflects the theory enunciated by the Supreme Court in *National Licorice Co.* v. *NLRB*: "The Board asserts a public right vested in it as a public body, charged in the public interest with

the duty of preventing unfair labor practices." 309 U. S. at 364. This public interest in preventing unfair labor practices cannot be entirely foreclosed by a purely private arrangement, no matter how attractive the arrangement may appear to be to the individual participants. Moreover, as the court below pointed out, "The Board was designed to prevent any unfair economic pressure or expedient arrangements condoning unfair labor practices." 220 F. Supp. at 24. The aim of the act to give special protection to the economically vulnerable would be defeated if contracts entered into because of that very vulnerability were enough to preclude enforcement of the act.

The Company acknowledges that such has been the law, but it contends that recent judicial trends require reconsideration of these propositions. First, it points to a number of cases which apparently hold that rights under the National Labor Relations Act can be waived by private contract. One line of these cases cited by the Company endorses the waiver by unions through collective bargaining agreements of their right to obtain information for use in collective bargaining under §8(a)(5), 29 U. S. C. §158(a)(5); *NLRB* v. *Perkins Machine Co.*, 326 F. 2d 488 (1 Cir. 1964); *Timken Roller Bearing Co.* v. *NLRB*, 325 F. 2d 746, 751 (6 Cir. 1963); *cert. denied*, 376 U. S. 971, 84 S. Ct. 1135 (1964). There are cases in this court to the same effect. *NLRB* v. *New Britain Machine Co.*, 210 F. 2d 61 (2 Cir. 1954); *NLRB* v. *Otis Elevator Co.*, 208 F. 2d 176, 179 (2 Cir. 1953).

Another line of cases sanctions the waiver by unions through no-raiding agreements with other unions of their right under § 9(c) of the Act, 29 U. S. C. §159(c), to petition the Board for certification as a collective bargaining agent: *United Textile Workers* v. *Textile Workers Union*, 258 F. 2d 743 (7 Cir. 1958); *Local 2608, Lumber & Sawmill Workers* v. *Millmen's Local 1495*, 169 F. Supp. 765 (N. D. Cal. 1958); *contra, International Union of Doll & Toy Workers* v. *Metal Polishers Union*, 180 F. Supp. 280 (S. D.

Cal. 1960). Still another case cited by the Company is *Retail Clerks Int'l Ass'n* v. *Lion Dry Goods, Inc.*, 369 U. S. 17 (1962), in which the Supreme Court held that a strike settlement agreement, which among other things obligated the parties to withdraw all unfair labor practice charges before the Board and to refrain from filing any new ones on account of the strike, was cognizable under §301(a).

Taking these instances of waiver in reverse order, we agree with the Union and the NLRB that the *Lion Dry Goods* decision was concerned only with the general question of whether a strike settlement agreement, including one executed by a union not entitled to be an exclusive bargaining agent, was a "contract" enforceable under §301(a). 369 U. S. at 18. It did not pass on the enforceability of specific provisions of the agreement. Likewise, the citation in the *Lion Dry Goods* decision to *United Textile Workers* v. *Textile Workers Union, supra,* alleged by the Company to constitute an endorsement of the full holding in that case, merely signified approval of the proposition that §301(a) provides a federal forum "for actions on other labor contracts besides collective bargaining contracts." 369 U. S. at 26.

As for the *United Textile Workers* decision itself, it too seems to have focused almost exclusively on the general question of whether contracts between unions which are not collective bargaining agreements are "contracts" enforceable under §301(a). 258 F. 2d at 748-49. It did not squarely face the problem of possible conflict with the policies of the National Labor Relations Act. When in a later case this problem was forcefully presented to the same Court of Appeals, it intimated that it might not apply the rule laid down in the *United Textile Workers* decision in every suit under §301(a) requesting enforcement of a no-raiding agreement. *NLRB* v. *Weyerhaeuser Co.*, 276 F. 2d 865, 875-76 (7 Cir. 1960), *cert. denied*, 364 U. S. 879 (1960).

Even more important for our purposes, the *United Textile Workers* decision concerned restraints on representa-

tion proceedings rather than on unfair labor practice cases. Whereas the latter, as shown above, enjoy express statutory protection from infringement by private agreements, the former do not. Thus, that decision is clearly distinguishable.

Similarly, the cases cited above that deal with the waiver by unions of their right to obtain information for use in collective bargaining are not controlling. It is noteworthy that none of these cases found such a waiver.[4] Thus their acknowledgement of the validity of this kind of waiver is is not entirely conclusive. Nor has the Board, to our knowledge, taken the position that such a waiver is inherently invalid, as it does in the present case with respect to a waiver of the right to charge an employer with anti-union discrimination. The Board's attitude on this point has presumably influenced the decisions to some extent.

Apart from the weakness of the authorities, there is reason to distinguish these two types of waivers. The obligation of an employer to disclose certain information to his employees' representative is only an extrapolation from the generalized prohibition contained in §8(a)(5) against refusal "to bargain collectively." By contrast, the right of employees to be free from anti-union discrimination by their employer is expressly proclaimed in §8(a)(3). Having the explicit sanction of Congress behind it, the latter may well be entitled to greater respect than the former when a court is called upon to invalidate a private agreement in the name of so vague a legal principle as "the public interest."

Second, the Company relies on a spate of recent Supreme Court decisions exalting the role of private agreements and private machinery in procuring industrial peace. One line

[4] The Company also cites *Sinclare Refining Co.* v. *NLRB*, 306 F. 2d 569 (5 Cir. 1962). The case is not in point. It concerned a dispute over the relevance of the information sought by the Union, and not a waiver of the Union's right to admittedly relevant information.

of such cases ordains an extreme laissez-faire policy on the part of the courts in reviewing arbitration awards, lest they discourge resort to private methods of settling labor disputes. The most famous of these are the so-called Steelworkers Trilogy: *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). The mood of these decisions was reaffirmed again by the Supreme Court in its most recent term. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964).

The other line of cases cited by the Company holds that enforcement of private agreements under §301(a) is not barred simply because the suit is also within the jurisdiction of the Board. *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95, 101 n. 9 (1962); *Smith* v. *Evening News Ass'n*, 371 U. S. 195, 197-98 (1962); *Humphrey* v. *Moore*, 375 U. S. 335, —— (1964); *Carey* v. *Westinghouse Elec. Corp.*, 375 U. S. 261 (1964).

These very cases, however, also explicitly affirm that the jurisdiction of the Board is not ousted because the suit arises under §301(a). As the Union and the Board point out, the fact that Board jurisdiction is non-exclusive does not mean that it has been altogether preempted by private contract enforcement. As for the cases which, in general, warn courts to abstain from meddling with arbitration awards, they are inapplicable to the Board which unlike the courts, is charged with vindicating a body of public rights set forth in the National Labor Relations Act. It is concern for these rights which precludes enforcement here of the arbitration agreement between the Union and the Company.

The final contention of the Company is that a waiver of the right to file unfair labor practice charges, contained in an arbitration agreement, should at least be enforced in those cases in which it is the declared policy of the Board

to defer to prior arbitration awards. According to a recent restatement of this policy, the Board will so defer "unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act." *International Harvester Co.*, 138 N. L. R. B. 923, 927 (1962), *aff'd sub nom. Ramsey* v. *NLRB*, 327 F. 2d 784 (7 Cir. 1964). The Company claims that the General Counsel of the Board has not proved, nor has he even alleged, that there was any such flaw in the award of the arbitrators in this case.

The most obvious answer to this objection is that the policy described above was adopted by the Board in the exercise of its own discretion to dispose of cases already before it. The courts ought not to transmute this Board policy into a rule of law and thereby prevent unfair labor practice charges from ever reaching the Board. However, the Company's contention does point up one fact relevant to the present proceedings before the Board. In the ordinary case, as the Supreme Court has noted approvingly, "the weight of the arbitration award is likely to be considerable, if the Board is later required to rule on phases of the same dispute." *Carey* v. *Westinghouse Elec. Corp.*, 375 U. S. 261, ——, 84 S. Ct. 401, 409 (1964). The arbitration award in this case, having been rendered by three former Chief Justices of the Supreme Court of Errors of the State of Connecticut, carries unusual weight. Presumably the Board will take this fact into consideration, if it has not already done so, in deciding whether to apply its policy of self-restraint.

The order of the lower court dismissing the Company's counterclaim for injunctive relief, insofar as such relief would bar the Union from maintaining unfair labor practice charges before the Board, is affirmed.[5]

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[5] The result has been reached without reference to those portions of the record on appeal which the Company moved to strike. Therefore the motion need not be and has not been determined.

HAYS, *Circuit Judge* (concurring in the result):

Rather than suggesting that the arbitration award carries "unusual" weight. I would remind the Board that we expect it to discharge its public duty under the statute without regard to the award.

I concur in the result.

Judgment

* * * * *

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of October one thousand nine hundred and sixty-four.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. STERRY R. WATERMAN,

HON. PAUL R. HAYS,
Circuit Judges.

* * * * *

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

APPENDIX B

National Labor Relations Act (29 U.S.C. § 151 et seq.)

* * * * *

National Labor Relations Board

* * * * *

Sec. 3. (d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

* * * * *

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to

encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by

agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry, (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding

and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

* * * * *

Labor Management Relations Act, 1947, as Amended 1959
(29 U.S.C. § 185)

* * * * *

TITLE III

Suits by and Against Labor Organizations

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which

such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

* * * * *